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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1547

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and injunction of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause No. 72-2030, on December 14, 1973.

OPINIONS BELOW

The December 14, 1973 opinion of the Court of Appeals as yet unreported is reprinted as Appendix C. The October 19, 1972 opinion of the United States District Court for the Southern District of Indiana, reported at 349 F. Supp. 605, is reprinted as Appendix B. The Findings of

Fact and Conclusions of Law of the District Court is printed as Appendix A.

JURISDICTION

The Board of School Commissioners of the City of Indianapolis, Indiana, Erle A. Kightlinger, Mrs. Cary Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, Kenneth Martz (now succeeded by W. Fred Ratcliff), members of the Board of School Commissioners of the City of Indianapolis and Karl R. Kalp, as Superintendent of Schools, and Wayne Kincaid, as Administrative Assistant are petitioners herein. Susan Chandler and Sally Swan for themselves and all others similarly situated are the respondents herein.

The judgment of the Court of Appeals was entered on December 14, 1973. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. In a court's consideration of the extent of constitutional (First and Fourteenth Amendments) restrictions upon the power of a school board to adopt rules governing student conduct in elementary and secondary schools:

a. Do the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes also apply to rules adopted by a school board which subject students to disciplinary measures for certain activities in school?

b. May conduct or language of minor students, not regulated in the community at-large, be constitutionally regulated within elementary and secondary schools?

c. Is it constitutionally permissible for school authorities to impose greater restrictions on minors than the

state could constitutionally impose on adults without violating the First Amendment?

2. Does the United States Constitution (First and Fourteenth Amendments) prohibit a school board from adopting rules concerning the distribution of literature by students in its elementary and secondary schools which subject students to disciplinary measures for the following activities?

a. Solicitation of funds or sales of literature and/or other products to students within elementary and secondary schools;

b. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

c. Student distribution of anonymous literature or literature which is not written by a student or school employee; and

d. Distribution of literature by students in schools while classes are being conducted in the school in which the distribution is to be made.

3. Are words found throughout a student newspaper, such as "f---, eat shit" awarding points for the number of "freak girls screwed," and a cartoon picturing the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," obscene as to minors and can school authorities punish students for the use of such language in elementary and secondary schools, even if such language is held to be filthy, vulgar and indecent, but not legally obscene as to minors?

4. Does the United States Constitution prevent a school board from adopting reasonable rules which would require

prior approval by school authorities of literature before its distribution in elementary and secondary schools?

5. Did the Court err in holding that Rule 17(c) of the Federal Rules of Civil Procedure requiring the appointment of an appropriate representative for infants in litigation did not apply where a constitutional question was presented?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States and Rule 17(c) of the Federal Rules of Civil Procedure which have been reprinted in Appendix D herein. The Rules promulgated by the Board which were held unconstitutional by the Court of Appeals are reprinted as Appendices E and F.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C., Section 1983, and 28 U.S.C., Sections 1343, 2201 and 2202.

On June 1, 1972, plaintiffs, high school students in the Indianapolis Public Schools, filed a class action for declaratory and injunctive relief, and for compensatory and punitive damages in the United States District Court for the Southern District of Indiana, the Honorable William E. Steckler, presiding trial judge. The defendants in said cause were the Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter referred to as the Board) and the Superintendent and Administrative Assistant of the Indianapolis Public Schools. Plaintiff students sought an injunction against said defendants, enjoining them from prohibiting distribution of the *Corn Cob Curtain*, an unofficial student newspaper, in the Indianapolis Public Schools. The students also sought a declaratory judgment that Board Rules 11.05 and 11.06 violated their constitutional rights (First and Fourteenth Amendments). These rules, which required the Superintendent's prior approval before sales or solicitations or the distribution of literature would be permitted in the schools, were declared unconstitutional by the District Court after an evidentiary hearing on August 24-25, 1972. The Court on August 24, 1972, also denied defendants' petition for appointment of guardian ad litem or next friend for plaintiffs and all members of the class they purport to represent.

In September, 1972, pursuant to the Court's order, the Board adopted Resolution 1033, amending Rule 11.05 and amended Resolution 1034, amending Rule 11.06. Resolution 1033 is printed as Appendix F. Although amended Rule 11.05 still required prior review of student literature, procedural safeguards and guidelines were added as were suggested by the Second Circuit in *Eisner v. Stamford Board of Education* (2d Cir. 1971), 440 F.2d 803. However, due to the Court's belief that any requirement of prior approval of student literature was unconstitutional and its order of September 29, 1972, directing the Board to submit additional and/or supplemental guidelines regarding the sale and distribution of student publications, the Board again amended Rule 11.05 to remove the requirement of prior review of student literature. The complete text of this final amendment is found in the District Court's Opinion in Appendix B.

On October 19, 1972, the Court entered a permanent injunction against the defendants, setting out certain conditions for Board rules and declared amended Rule 11.06 and five sections of amended Rule 11.05 unconstitutional. The amended sections or rules held unconstitutional are printed in Appendix E. On November 9, 1972, defendants filed a notice of appeal to the United States Court of Ap-

peals for the Seventh Circuit from the judgment and order of October 19, 1972. The Board requested that the Court of Appeals hold that the first amendment of Rule 11.05 (prior approval with safeguards) and the second amendment of Rule 11.05 and Rule 11.06 were constitutionally permissible and that the Court find the foul language in the *Corn Cob Curtain* obscene as to minors or that minor students could be disciplined for the use of such language in school even if it was not legally obscene as to minors.

In addition, the Court of Appeals was requested to reverse the District Court's decision due to its failure to follow Rule 17(c) of the Federal Rules of Civil Procedure, and to vacate part of the injunction for overbreadth and declare it invalid to the extent that it prohibits review of student literature prior to its distribution in school. Although the Court of Appeals failed to mention these last two issues, it affirmed the District Court's judgment and injunction in all respects, Judge Christensen dissenting in part.

After the distribution of a few issues of the *Corn Cob Curtain* (hereafter referred to as *CCC*), the students were informed that they could not sell the *CCC* in school because of its obscene, defamatory, abusive, filthy and indecent content, and its disruptive effect on the learning process. School officials objected to the use of language such as "eat shit," and "f - - -," an obscene cartoon depicting the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," and false charges of racial discrimination against a coach.

The testimony of the Superintendent and affidavits from all principals in Indianapolis high schools and over 100 parents in the school community were offered and admitted to prove that the *CCC* appealed to the prurient, shameful

or morbid interest of minors, was patently offensive to prevailing standards in the community with respect to what is suitable material for minors and utterly without redeeming social importance for minors. There were no counter affidavits. In fact, plaintiffs testified that the use of such four-letter words was improper, upsetting, and embarrassing and that anonymous articles were sent to a post office box and were printed in the *CCC* as is, with absolutely no editing. Furthermore, it was the policy of the *CCC* never to edit material received, even from unknown sources and to protect the names of its authors.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

Six Board rules governing student conduct and distribution of literature in the Indianapolis Public Schools were held facially unconstitutional for vagueness and/or overbreadth. No other court in the history of this country has held similar Board rules unconstitutional. The Court based its decision on three erroneous principles of law. First, the Court assumed that the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes must also apply to rules adopted by a school board which subject students to disciplinary measures for certain activities in schools. Second, the Court assumed that if the conduct or language of minor students was not regulated in the community at-large or could not result in criminal prosecution, it could not constitutionally be regulated within elementary and secondary schools. Third, it assumed that the power of school authorities to control the exercise of press related activities of minors does not reach beyond the scope of state authority over adults. These premises or principles of law on which the Court based its opinion have been rejected in similar cases by other courts of appeal and also conflict with principles announced by this Court.

a. CRIMINAL STATUTES vs. SCHOOL BOARD REGULATIONS

The question whether the same constitutional standards and tests for vagueness and overbreadth applicable to criminal statutes enacted by a legislature must also apply to rules for student conduct adopted by a school board has never been, but should be decided by this Court. The Court of Appeals in declaring six Board rules facially unconstitutional for vagueness and/or overbreadth assumed that the Board and legislature should be held to the identical strict standards. This assumption flies in the face of numerous decisions to the contrary.

In *Jones v. State Board of Education,* (D.C. Tenn., 1968), 279 F. Supp. 190, *aff'd* (6th Cir.) 407 F.2d 834, *cert. gr.* 396 U.S. 817, *cert. dism'd.* 397 U. S. 31, *reh. den.* 397 U.S. 1018, the Court rejected the contentions of university students that regulations under which they were expelled (for distributing literature advocating a student boycott) were unconstitutionally vague. These regulations prohibited "(1) Disrespect for university authority, (2) Any act in violation of city, county, state or federal law; and (3) Any other infractions of standards of conduct that require severe disciplinary actions." (279 F.Supp. at 201) The Court noted that the students were not attacking a state *statute,* but a student *regulation* found in a university handbook and said "University regulations for students because of the very nature of the institution and its goals and purposes, should not be tested by the same requirements of specificity as are state statutes." (279 F.Supp. at 202.)

In *Baker v. Downey City Board of Education* (D.C. Cal., 1969), 307 F.Supp. 517, the Court held that the state education regulation under which two students were suspended for using profanity and vulgarity in a high school newspaper, which regulation permitted a student's suspension

or expulsion from school for "continued willful disobedience, habitual profanity or vulgarity," was not void for vagueness. The court stated that the requirements for reasonable certainty in schools laws and regulations does not preclude the use of ordinary terms, such as profanity and vulgarity, which find adequate interpretation in common usage and understanding. Yet the Court in the case at bar questioned such words as "significant" and "disruption."

The Third Circuit in *Sill v. Pennsylvania State University,* (3rd Cir., 1972), 462 F.2d 463, stated that since student discipline is not analogous to criminal prosecution, the codes of conduct prescribed for students by educational institutions are not required to satisfy the same rigorous standards for vagueness and overbreadth as are criminal statutes. The court in *Esteban v. Central Missouri State College,* (W.D. Mo., 1968) 290 F.Supp. 622, aff'd 415 F.2d 1077 (8th Cir., 1969), *cert. denied,* 398 U.S. 965, held that the legal doctrine that a prohibitory *statute* is void if it is overly broad or unconstitutionally vague does not, in the absence of exceptional circumstances, even apply to rules of student conduct. The court stated:

> "Judicial notice is taken that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education. . . . By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes, and functions of the institution." (290 F.Supp. at 630.)

To illustrate the Court of Appeal's error, Section 1.1.1.3 of Rule 11.05 (hereafter referred to as Rule A) will be briefly discussed. This rule, held facially unconstitutional for both vagueness and overbreadth, provides:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis Public Schools, or injury to others."

The District Court suggested that the following wording of this rule would be more apt to be constitutionally acceptable:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a substantial and material interference with or delay of normal classroom activity or normal school function."

Defendants respectfully submit that it is not the proper function of a court to declare a rule so vague as to deny due process simply because it preferred other terminology which has the same meaning.

The Court's decision is also in direct conflict with the Second Circuit since it held that a rule virtually identical to Rule A was neither overbroad or too vague. *Eisner v. Stamford Board of Education,* (2d Cir., 1971), 440 F.2d 803. All literature to be distributed in school was to be submitted for prior approval by the school administrator, who, in granting or denying approval, would apply the following rule:

> "No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others." (440 F.2d at 805)

The Second Circuit said to the extent this rule "merely vests school officials with authority which under *Tinker* they may constitutionally exercise, it is on its face unexceptionable." (440 F.2d 808.) The Seventh Circuit was unimpressed by the similarity of Rule A to the *Tinker* standard (App. p. 20) *Tinker v. Des Moines Independent School Dist.,* (1969), 393 U.S. 503. Yet to hold Rule A (which departs in no significant respect from the similar instruction of *Tinker*) void for vagueness and overbreadth contradicts this Court's announcement in *Tinker* that school officials may curtail student actions, even speech, which materially interferes with school activities or discipline. Although the *Eisner* rule did not specify that the foreseeable disruption be either material or substantial as this Court required in *Tinker,* the Second Circuit assumed that the Board would not contemplate suppression of matter that would create only an immaterial disturbance. In contrast, the Seventh Circuit objected to the use of "significant disruption" in Rule A (App. p. 20) Yet many courts would require the *Eisner* rule to be even more precise than Rule A because the *Eisner* guideline was to be used as a basis for prior restraints, while Rule A permits only *subsequent* restraints.

Furthermore, implicit in the Court's finding that Rule A is overbroad is the premise that students should be able to cause *some type* of significant disruption in the school for which they could not be disciplined. This is revealed by the Court's statement that "Expression may lead to disorder under many circumstances where the expression is not thereby deprived of First Amendment protection." (App. p. 21) Since there is no normal educational purpose, function or process which students should be permitted to significantly disrupt, this rule is not unconstitutional for overbreadth.

COURT'S INJUNCTION IS FATALLY OVERBROAD

A crucial part of the issue of overbreadth raised in, but ignored by, the Court of Appeals is that part of the District Court's Order, which permanently enjoins the Board from

the promulgation or enforcement of any rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material, ..." (App. p. 14) The Court of Appeals, in affirming the District Court's decision, upheld this broad injunction although it completely undermines the legal authority and duty of the Board to formulate rules governing the distribution of student literature in its schools. Under Indiana law (P.L. 162, Ind. Stat. Ann., Sec. 28-5358 et seq.), students may not be suspended or expelled unless they have violated a *written* rule approved by the Board. Yet any such rule which would be held permissible under the guidelines of this Court in *Tinker* would constitute a violation of this broad injunction. Thus, this injunction should be vacated for overbreadth since the principles announced by this Court in *Tinker* would clearly allow school authorities to discipline students who distribute materials which cause riots or reactions which substantially disrupt or interfere with school discipline or activities.

Since the Court's injunction prohibits the Board from disciplining students for written material which is not constitutionally protected, i.e., language which causes disruptive "reactions," it also conflicts with the unassailable power of the state to suppress "fighting words . . . which by their very utterance inflict injury and tend to incite an immediate breach of the peace," recognized by this Court in *Chaplinsky v. New Hampshire,* (1942), 315 U.S. 568, or words which "have all the effect of force," *Near v. Minnesota ex rel. Olson* (1931), 283 U.S. 697 at 716.

b. SCHOOL v. COMMUNITY AT-LARGE

In an elementary or secondary school, many children of widely differing backgrounds are brought together for eight hours a day in one building for the purpose of developing their basic intellectual and vocational capacities,

which effort is distasteful to many and resisted by some. There must necessarily be an adjustment of the constitutional principles applicable to the community at-large if the school is to function and accomplish its purpose. Although students do not shed their First Amendment rights at the schoolhouse gate, this Court implicitly recognized in *Tinker* that speech which might be acceptable in the community at-large could constitutionally be prohibited in the schoolhouse under certain circumstances. The rules in the case at bar simply specify certain conduct and circumstances which school authorities must control in order to function effectively without undue disruption.

Although this Court in *Tinker* examined the First Amendment rights of students in light of the special characteristics of the school environment, the Court of Appeals ignored these special circumstances which justify the Board rules. This is revealed throughout the opinion, not only in the Court's application of principles from criminal and other cases pertaining to circumstances and social structures entirely different from that found in the schoolhouse, but by the Court's belief that the Constitution requires school officials to tolerate certain actions or literature which would cause disorder or disruption in the school. (App. p. 21) It failed to recognize that certain acts or speech which might be constitutionally protected in the community at-large would not be so protected in the schoolhouse due to its unique circumstances and functions.

The premise of the Court of Appeals that the regulation of students' speech related activities in the school cannot be more restrictive than in the community at-large has been explicitly rejected by other courts of appeal in their examination of the authority of the school board to regulate student literature in its schools. For example, *Shanley v. Northeast Independent School District,* (5th Cir., 1972), 462 F.2d 960, which upheld the right of school authorities

to require prior approval of material destined for distribution to students, found that the nature of the place in which the restraint operates to be of critical significance. It said:

> "The educational process is thwarted by the milling, mooing and haranguing along with the aggressiveness that often accompanies a constitutionally-protected exchange of ideas on the street corner. There is, of course, a substantive difference between schools and the street corner in terms of weighing the sometimes competing interest of a completely free flow of any and all expression with the requirement that there be order and discipline . . . Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high school, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms." (462 F.2d at 968-9.)

c. MINORS v. ADULTS

The third principle on which the Court based its decision, that the power of school authorities to control the conduct and speech of minors does not reach beyond the scope of state authority over adults, has been rejected by this Court as well as other courts in their consideration of the scope of First Amendment protection. This Court recently observed in *Ginsberg v. New York,* (1968), 390 U.S. 629, 638:

> ". . . We have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .' *Prince v. Massachusetts,* 321 U.S. 158, 170."

Most courts have concurred in the view that, while freedom of the press may not be denied to students, a more stringent regulation of the student press than of the press generally is warranted because of the immaturity of students, especially with respect to high school students. For example in *Schwartz v. Schuker* (D.C. N.Y., 1969), 298 F.Supp. 238, the court, upholding an expulsion of a student for attempting to distribute an underground high school newspaper which, among other things, called the principal a liar and racist, observed that "the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen fact from propaganda." (298 F.Supp. at 242)

The Fourth Circuit shared this view when it stated in *Quarterman v. Byrd,* (4th Cir., 1971), 453 F.2d 54, that publications may be protected when directed to adults, but not when made available to minors, since First Amendment rights of children are not co-extensive with those of adults. Similarly, the court continued, "a difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university," it being "generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations reasonably defined to adjust these rights to the needs of the school environment." (453 F.2d at 58)

Courts recognize that the "conduct which would affect discipline in secondary schools might go unnoted and be of little or no influence with older students" *Whitsell v. Pampa Independent School District,* (N.D. Tex., 1970), 316 F. Supp. 852, *aff'd* (5th Cir., 1971) 439 F.2d 1198.

The Court of Appeals erred when it failed to consider the significance of age in its determination that the Board rules were not reasonable or necessary to preserve a semblance of discipline, order and decorum in the educational system and that the filthy, obscene language used in the Corn Cob Curtain was not obscene as to minors.

QUESTION TWO

The decision below also conflicts with the well-established principle that a school board rule which regulates student conduct in the schoolhouse should be upheld if there is a reasonable connection of the rule with the proper operation of the schools. *Shanley v. Northeast Independent School District,* (5th Cir., 1972), 462 F.2d 960; *Katz v. McAulay,* (2nd Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933; *Blackwell v. Issaquena County Board of Education,* (5th Cir., 1966), 363 F.2d 749.

a. *Rule 11.06 and Section 1.3.1.5 of Rule 11.05*

(Sales and Solicitations)

When the Court held facially unconstitutional Rule 11.06 and Section 1.3.1.5 of Rule 11.05, which regulate solicitation of funds and sales of literature and other items in the Indianapolis Public Schools, it required the Board to permit its schools to be used for the sale of items for the personal profit of students and/or non-students. This offends the basic principle that "the state, no less than a private owner of property, has the power to preserve property under its control for the use to which it is lawfully dedicated." *Adderly v. Florida,* (1966), 385 U.S. 39. A school board is clearly under no constitutional duty to allow its schools to be used for non-school purposes—particularly commercial activities.

This decision also conflicts with the Second Circuit in *Katz v. McAulay, supra,* which upheld a rule prohibiting

the solicitation of funds from pupils in public schools (without prior written approval by the Board). Although there are many compelling reasons for such a rule, some of which are discussed in *Cloak v. Cody* (N.D.N.C., 1971), 321 F. Supp. 391, which upheld a similar rule, the Second Circuit emphasized the pressures upon students of multiple solicitations and the fact that solicitations compete for the time, attention and interest of the pupils with those who are seeking to administer the school system.

c. *Sections 1.1.1.4 and 1.3.1.6 (Anonymous literature written by non-students)*

Section 1.1.1.4 (hereafter Rule B) which subjects students to disciplinary measures if they distribute in school materials (other than advertisements in the literature) not written by a student or school employee, and Section 1.3.1.6 (hereafter Rule C) which requires the names of persons or organizations participating in the publication of literature in the schools to be plainly written in the literature were held to violate students' First Amendment rights.

The power or right of a school board to regulate the distribution by students in elementary and secondary schools of anonymous literature or materials written by non-students or outside organizations is an issue which has not been, but should be decided by this Court. No other court has held similar rules unconstitutional. Rule B is both reasonable and necessary to prevent the distractions, disorder and interference with school activities which would result if students were permitted to sell or distribute materials written by non-students and outside organizations to a large captive audience of immature minds. Since non-students or outside organizations have no legal or constitutional right to sell or distribute anything in the schools, they cannot subvert this basic principle by having students distribute their material. Since this rule places no restric-

tions on what *students* can quote or write, it is not an infringement of their First Amendment rights.

The requirement in Rule C that names of participating students appear in the publication has a reasonable basis. Such a rule is the only reasonable means to identify those responsible for misrepresentation, serious disruption, fraud, libel and obscenity since the *Corn Cob Curtain* edits nothing and protects the names of its authors.

This Court has upheld federal statutes which prohibit anonymous publications in certain situations. For example, a statute requiring any newspaper using the second class mails to publish the name of its editor, publisher, owner and stockholders was upheld in *First Louis Publishing Co. v. Morgan,* (1913), 229 U.S. 288. A direct analogy can be made to the instant case. The Board's control over the use of its schools may be compared to the government's control over the use of its mails. The Federal Regulation of Lobbying Act in which Congress requires those engaged in lobbying to divulge their identities and certain other information was held valid in *U.S. v. Harriss,* (1954), 347 U.S. 612. This Court noted that although some person might choose to remain silent because of fear of possible prosecution for failure to comply with the Act, "the restraint is at most an indirect one resulting from self-censorship . . . ," (347 U.S. at 626.) The Board submits that any similar deterrent effect Rule C might have upon a student's First Amendment rights is too indirect, speculative and insubstantial to justify holding it unconstitutional.

The Seventh Circuit's reliance upon *Talley v. California,* (1960), 362 U.S. 60, in declaring Rule C unconstitutional, was misplaced since *Talley* was specifically restricted to the broad penal ordinance at issue. This ordinance barred distribution of "any handbill in any place under any circumstances" unless it contained the names and addresses of the person(s) who printed, wrote, compiled, manufactured or distributed it. To equate the Board rule with this ordinance is to ignore the reasons for the rule and the unique circumstances, environment and functions of the school. The rule, unlike the ordinance in Talley, is not a criminal statute and applies only to children, students on school property.

d. *Section 1.3.1.1 (Distribution during class hours)*

Section 1.3.1.1 prohibits the student distribution of literature in school while classes are being conducted in the school. Neither *Grayned v. City of Rockford,* (1972), 408 U.S. 104, nor *Tinker, supra,* cited by the Court as support, require or justify the Court of Appeals decision that this rule was facially unconstitutional for overbreadth. In fact, said decision conflicts with the principles announced in these cases. Contrary to the belief of the Seventh Circuit, a primary or secondary school is not a public place in the same sense as street and parks. In fact, both *Grayned* and *Tinker* recognized the "special characteristics of the school environment" and that a speech connected activity which might be perfectly appropriate in a park may unduly interfere with the good order and functioning of a school. This Court in *Grayned* stated that the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time because "the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." (408 U.S. at 116.)

The Seventh Circuit concedes that it is constitutionally permissible to prohibit distribution in the classroom itself or elsewhere in the school if all the students are required to be in a class. However, the Court erroneously assumed that there are periods when substantial numbers of students are in school, but are not involved in classroom activity at the time classes are in session for other students. The only

time that some students would be at school and yet not in class while classes are in session would be during a split lunch or split assembly period. To prohibit distribution of literature in the cafeteria or in a school assembly is not an impermissible infringement upon students' First Amendment rights, since it is not unconstitutional to limit their uses as places to eat or watch programs. To allow distribution of literature in the cafeteria or auditorium during assemblies would unreasonably interfere with the proper order and functioning of both.

QUESTION THREE

This Court has never decided, but should settle, the crucial issue of the extent of the power of school officials to either prevent or punish the use in elementary and secondary schools by minors of such language as "f---, screw, and eat shit." The Court held that this foul language and the filthy cartoons found throughout the *CCC* were not obscene as to minors and thus not subject to any control by school authorities. In so holding, the Court misconstrued and erroneously extended and misapplied several decisions of this Court.[1] Crucial facts and circumstances in these three cases can be readily distinguished from those of the case at bar. The instant case concerns *minors* in the unique setting of the elementary or secondary schoolhouse. No criminal conviction is involved as in *Cohen* and *Miller*, and there has been no attempt to regulate speech or press outside of the school.

The Board submits that the *CCC* is obscene as to minors under *Ginsberg v. New York*, (1968), 390 U.S. 629 in which this Court recognized that the standard for legal obscenity for children differs from the standard for adults. All the

[1] *Papish v. Board of Curators of University of Missouri*, (1973), 410 U.S. 667; *Cohen v. California*, (1971), 403 U.S. 15; *Miller v. California*, (1973), — U.S. —, 41 L. W. 4925.

evidence revealed that the *CCC* is obscene as to minors. There was no evidence to the contrary. Furthermore, such important interests of the Board as maintaining an atmosphere conducive to an orderly program of classroom study and learning require the prohibition of the use of such filthy language by minors in school even if it is not legally obscene as to minors. The quality of education in this country depends upon this Court's decision.

QUESTION FOUR

This Court should also resolve the conflict between the Seventh Circuit and other courts of appeal as to whether a school board may constitutionally adopt a reasonable rule requiring the prior approval by school authorities of literature before its distribution by students in elementary and secondary schools.

In contrast to the Seventh Circuit, which is clearly of the opinion that a school board could never justify any prior restraint upon student literature in schools, *Fujishima v. Board of Education*, (7th Cir., 1972), 460 F.2d 1355, other courts of appeal have generally upheld the right of school boards to require review of literature prior to its distribution in schools, subject to procedural safeguards insuring a prompt, non-arbitrary decision. For example, the Second Circuit in *Eisner v. Stamford Board of Education*, (2nd Cir., 1971), 440 F.2d 803 said that if the bases for previously restraining student literature are clearly set forth in the school regulations and are valid, that is to say, such as would justify subsequent restraint or punishment, then in view of the special nature and purpose of schools and the immaturity of its inhabitants, it is reasonable to permit prior restraints. In *Shanley v. Northeast Independent School District*, (5th Cir., 1972), 462 F.2d 960, the Fifth Circuit concluded that it is constitutionally permissible to require that material destined for distribution to students

be submitted to the school administration for approval prior to distribution.

The belief of the Seventh Circuit that any prior restraint upon student literature is unconstitutional also conflicts with decisions of this Court. For example, this Court in *Chaplinsky v. New Hampshire, supra,* said:

> "There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have *never* been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Emphasis added, 315 U.S. at 571.)

More recently, this view was reaffirmed when this Court observed in *Bantam Books, Inc. v. Sullivan,* (1963), 372 U.S. 58, 70 n. 10, that prior restraints are not "necessarily unconstitutional under all circumstances."

Petitioners respectfully request that this Court define the permissible limits of prior approval of student materials by the Board and hold constitutional the Board's first amendment of Rule 11.05 (App. F) and declare the Court's injunction invalid to the extent that it prohibits the Board from requiring prior approval of literature in schools.

QUESTION FIVE

The District Court held that where constitutional questions as distinguished from money damages are involved, the requirements of F.R. Civ. P. 17(c) (Appendix D) do not apply. This rule required the Court to either appoint a guardian ad litem for minor plaintiffs and the infants they purported to represent or make such other order as was proper for their protection.

The Court's refusal to apply F.R. Civ. P. 17(c) conflicts with the Fifth Circuit's decision in *May Roberts, et al. v.*

Ohio Casualty Insurance Company (5th Cir., 1958), 256 F.2d 35 which said:

> "We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the Court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the Court has considered the matter and made a judicial determination that the infant is protected without a guardian. In *Till v. Hartford Accident & Indemnity Co.,* (10th Cir., 1941), 124 F.2d 405, the Court found that a guardian ad litem was not necessary only because the infant was represented through a next friend, the alter ego of a guardian ad litem. In *Zaro v. Strauss,* (5th Cir., 1948), 167 F.2d 218, this Court held that an attorney's representation of an incompetent was insufficient to satisfy the requirements of Rule 17(c).
>
> "The record in this case shows that no one gave a thought to the appointment of a guardian ad litem until after judgment was rendered below. Apparently it was an oversight. We believe that the discretion lodged in the trial judge in Rule 17(c) was not intended to apply to such a situation. The orderly administration of justice and the procedural protection of minors requires the trial judge to give due consideration to the propriety of an infant's representation by a guardian ad litem before he may dispense with the necessity of appointing the guardian.
>
> "The judgment is reversed and remanded for further proceedings not inconsistent with this opinion."

The Seventh Circuit's decision not only reveals the Court's refusal to differentiate betwen minors and adults even when the Federal Rules so require, but is significant because of the distinct possibility that infant plaintiffs could have reversed the decision had they lost.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

JEFF JACOBS, ET AL., *Plaintiffs,* v. THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., *Defendants.*	United States District Court, S. D. Indiana, Indianapolis Division No. IP 72-C-263 Oct. 19, 1972.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STECKLER, Chief Judge.

Heretofore, on June 1, 1972, Jeff Jacobs, Susan Chandler, Martin Laubach, Nancy Rood, Sally Swan and George Yarbrough, for themselves and all others similarly situated, filed their complaint and motion for temporary restraining order against the original defendants for relief with respect to the rule, regulation and policy of the defendants which prohibited the sale and distribution of student publications unless previously authorized by the General Superintendent. Since the filing of plaintiffs' complaint, Jeff Jacobs, Martin Laubach, Nancy Rood and George Yarbrough have graduated from the secondary schools in the Indianapolis Public School System. The Court takes judicial notice of the fact that certain changes have recently taken place with respect to the composition of the defendant. The Board of School Commissioners of the City of Indianapolis, Indiana, and accordingly, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, and Constance R. Valdez are substituted respectively for Robert DeFrantz, Sammy Dotlich, Jerry P. Belknap, and Landrum E. Shields.

The substance of plaintiffs' complaint is that the defendants have unconstitutionaly prohibited distribution of the Corn Cob Curtain, a student newspaper, by imposing prior restraints thereupon.

The Court assigned August 24, 1972, as the hearing date for plaintiffs' motion for temporary restraining order and preliminary injunction. Thereafter, on August 29, 1972,

this Court ordered that the Board of School Commissioners of the City of Indianapolis shall have three weeks from that date to adopt reasonable guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis. On September 27, 1972, the Board of School Commissioners of the City of Indianapolis filed their revised Resolutions 1033 and 1034 which resolutions amended Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners. Resolution 1033 provided for prior review of student publications; Resolution 1034 prohibited sales of any student publication or of the collection of contributions to support such publications.

The parties, by counsel, having met in conference with the Court on September 27, 1972, and the Court taking the matters under advisement, this Court ordered plaintiffs to submit to the Court reasonable guidelines regarding the sale and distribution of student publications in the public schools of the City of Indianapolis no later than October 6, 1972. This Court also ordered the Board of School Commissioners of the City of Indianapolis to submit to this Court additional and/or supplemental guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis no later than October 13, 1972. Both parties have submitted their guidelines as ordered by the court.

The Court, pursuant to Rule 52, Federal Rules of Civil Procedure, now makes it findings of fact and conclusions of law.

FACTS

1. That plaintiffs are students in the public schools of the City of Indianapolis who publish a student publication entitled the "Corn Cob Curtain."

2. That defendants have adopted, implemented and enforced Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners which prohibit the distribution and sale of all student publications unless authorized by the General Superintendent.

3. That the plaintiffs were prohibited from distributing, selling and seeking voluntary contributions for the Corn

Cob Curtain in the public schools of the City of Indianapolis.

4. That the defendant Board of School Commissioners of the City of Indianapolis subsequently amended their Rules by the adoption of Resolution 1033 and 1034 which respectively require prior review of publications and prior approval before students can distribute publications, and which prohibit the sale, collection of money or solicitation of funds or contributions within any school in the City of Indianapolis.

5. In a final revision of its rules, the Board of School Commissioners further amended Rule 11.05 so as to prohibit distribution in any school of literature not written by a student, teacher or other school employee, and which contain vague prohibitions against advertisements contained in student publications. The guidelines further prohibit distribution while classes are being conducted in the school in which the distribution is to be made. The rule further prohibits sales and contributions to finance such publications or distributions, and requires that the name of every person or organization be plainly written on the literature itself.

6. Rule 11.06, as amended, remained unchanged.

7. Plaintiffs have been prohibited from distributing the Corn Cob Curtain from June 3, 1972, to the present by reason of the aforementioned rules.

8. Plaintiffs have another issue of the Corn Cob Curtain which is ready for current distribution in the public schools of the City of Indianapolis.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject-matter of this cause pursuant to 28 U.S.C. § 1343.

2. This Court, in view of the recent decision rendered in the case of *Fujishima* v. *Board of Education*, must hold that defendants' rules constitute an unconstitutional prior restraint in violation of the First Amendment. Absent a showing of material and substantial interference with the requirements of school discipline, schools may not restrain

the full First Amendment rights of their students. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

3. Defendants have failed to show any material and substantial interference with school discipline in this cause.

4. Plaintiffs have the right as guaranteed by the First Amendment to publish and distribute the Corn Cob Curtain in the public schools of the City of Indianapolis.

5. Defendants may not prohibit the sale and/or collection of voluntary contributions for the Corn Cob Curtain. *Riseman* v. *School Committee*, 439 F.2d 148 (1st Cir. 1971); *Sullivan* v. *Houston Independent School District*, 333 F. Supp. 1149 (S.D. Tex. 1971).

6. Plaintiffs may publish, distribute, sell, and seek voluntary contributions for the Corn Cob Curtain pursuant to the provisions of the First Amendment to the United States Constitution.

APPENDIX B

JEFF JACOBS, ET AL.,
Plaintiffs,
v.
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,
Defendants.

United States District Court, S. D. Indiana, Indianapolis Division
No. IP 72-C-263
Oct. 19, 1972

ENTRY ON MOTION FOR PERMANENT INJUNCTION

STECKLER, Chief Judge.

This action is before the Court on the plaintiffs' motion for, among other things, an order against the defendants enjoining said defendants, their agents, servants, and employees, and all those in active concert and participation with them, from continuing to suppress and prohibit the distribution of the *Corn Cob Curtain*. Jurisdiction is based under Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343, 2201 and 2202.

On August 24-25, 1972, an evidentiary hearing was conducted. Oral argument was heard on the motion for temporary restraining order and the collateral issues raised by Defendants' Petition for Appointment of Guardian Ad Litem or Next Friend for Plaintiffs and All Members of the Class They Purport to Represent, and Petition of Defendants for an Order Requiring Plaintiffs' Attorney to Produce Authority Under Which He Appears. The Court denied defendants' motion to assign guardian ad litem, and granted defendants' motion for plaintiffs' attorney to show authority. Plaintiffs' attorney filed a memorandum in response to defendants' motions; the Court found that the regulations governing the services to be rendered by the Legal Services Organization and the persons whom it is to represent was not a matter for this Court to determine or fix, but rather if the defendants had a complaint, this

was a matter to be taken up with the funding authorities and the organized bar. The Court found that plaintiffs' attorneys could proceed with representation. *See, Hernandez* v. *Stockton Bd. of Education,* 6 Clearinghouse C.R. 172 (July 1972); *State ex rel. Koch* v. *Vanderburgh Probate Court,* 246 Ind. 139, 203 N.E.2d 525 (1965).

The parties by counsel met in conference with the Court on September 27, 1972, and the defendants presented Resolutions 1033 and 1034 having been adopted by the Board of School Commissioners of the City of Indianapolis to amend Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners, *i.e.,* the rules subject to complaint in this litigation. While these resolutions were under advisement for further consideration by the Court, the defendants filed Additional Paragraph of Answer with exhibits on October 12, 1972, with consent of plaintiffs; Exhibit A attached thereto replaced Resolution 1033 filed September 27, 1972, and Exhibit B was identical to Resolution 1034 filed September 27, 1972. [Hereinafter Exhibits A and B filed October 12, 1972, amending School Board Rules 11.05 and 11.06, will be referred to as Rules 11.05 and 11.06.]

Rules 11.05 and 11.06 subject to complaint in this litigation are as follows:

Rule 11.05 [Exhibit A]

1. *General.* The following rules shall govern the distribution of literature and other communicatory material (hereinafter collectively referred to as 'literature') by students in the Indianapolis public school system (any of whom is hereinafter referred to as 'a student') in or upon the School Board's public school buildings, structures and/or grounds (the term 'school' being used, hereinafter, to signify any such building, structure or the grounds of any such building or structure).

1.1. *Distribution of Certain Kinds of Literature Prohibited.*

1.1.1. No student shall distribute in any school any literature that is—

1.1.1.1. obscene as to minors

1.1.1.2. libelous or

1.1.1.3. either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.

1.1.1.4. not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted.

1.1.2. Literature other than literature of the kind described in Section 1.1.1. above, is hereinafter referred to as 'distributable literature.'

1.2. *Who May Distribute Distributable Literature.* Subject to the provisions of Section 1.3. below, distributable literature may be distributed by, and only by, any student, within any school in which the student is regularly enrolled.

1.3. *Conditions Under Which Distributable Literature May Be Distributed.*

1.3.1. No distributable literature shall be distributed by any student in any school—

1.3.1.1. while classes are being conducted in the school in which the distribution is to be made;

1.3.1.2. in any place other than a place designated by the principal of the school in which the distribution is to be made, which place shall be selected by the principal with a view toward insuring that the proposed distribution will be made without interference with other persons lawfully within the school;

1.3.1.3. in such a way that the place of distribution (or any other part of the school in which the distribution is made) becomes littered;

1.3.1.4. in such a way that any person within the school can reasonably be made to feel that the distributable literature is being 'forced' upon him;

1.3.1.5. in immediate exchange for money or any other thing of value (or for an immediate promise of money or

any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature; or

1.3.1.6. unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself.

1.4. *Spirit in Which the Foregoing Regulations are to be Applied.*

In the application of the foregoing regulations pertaining to the distribution of literature in the schools by students, principals and other school administrators shall take care to insure that the constitutional and other legal rights of students to express themselves freely shall not be infringed. The spirit in which the regulations shall be applied shall not be a repressive one, but shall combine a respect for the rights of students with an appropriate regard for the maintenance in the schools of the kind of environment that is necessary to the School Board's conduct of its public educational mission in the School City of Indianapolis.

1.5. *Limitation of the Scope of the Foregoing Rules.*

The foregoing rules define the conditions under which students will be permitted to distribute literature in the schools. Nothing in those rules is intended to be, or is, or shall be construed as, an indication that the School Board will permit, without its express prior consent, the distribution in any school of any literature or other article by any person who is not a student in the school where the literature is to be distributed.

1.6. *Penalties for Violation and Student Rights of Review and Appeal.*

1.6.1. For violation of any of the provisions of this Rule 11.05 a student may be suspended or expelled by the principal of the school where such violation occurs and the principal or any teacher of the school may take other disciplinary action which is reasonably desirable or necessary to help any student, to further school purposes, or to prevent any interference therewith.

1.6.2. In the event that suspension or expulsion is deemed necessary, the due process provision of public law 162 of the laws of the State of Indiana and the rules of this board adopted by Resolution #1030 shall apply.

1.7. *Severability of Rule.*

If any one or more sections, clauses or phrases of this Rule 11.05 shall be declared unconstitutional, such decision shall in no sense invalidate any other part of this act.

Rule 11.06 [Exhibit B]

No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, *or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance,* may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus.

The Seventh Circuit has held that students may commence actions seeking relief for infringement of their constitutional rights. *Fujishima* v. *Bd. of Education,* 460 F.2d 1355 (7th Cir. 1972); *Scoville* v. *Bd. of Education of Joliet Tp. H. S. Dist. 204, etc.,* Ill., 425 F.2d 10 (7th Cir. 1970); *Crews* v. *Cloncs,* 432 F.2d 1259 (7th Cir. 1970).

In the instant case there can be no discomfort to strict constructionists who prefer their Constitution to be literal. No right is more clearly within the protection of the First Amendment, whose provisions *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), has now extended to the public school, than the freedom to distribute printed matter. Throughout our constitutional history, only three exceptions have been permitted to limit this freedom, and the exceptions themselves have been narrowly construed; these exceptions include obscenity, libel, and speech which con-

stitutes a "clear and present danger." [In the context of the public school, the *Tinker* decision defined "clear and present danger" as that which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. 503 at 513, 89 S.Ct. 733 at 740.]

The interpretation of two of these three limitations, obscenity and to a lesser degree, "clear and present danger," provides the matrix for the controversy confronting this Court.

PRIOR RESTRAINT AND PRIOR CENSORSHIP

In the recent Seventh Circuit case of *Fujishima, supra,* a blanket prior restraint similar to the one relied upon by defendants in the instant case was invalidated. The Court disposed of the matter saying:

> "Because section 6-19 requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment. This conclusion is compelled by combining the holdings of *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697 [51 S.Ct. 625, 75 L.Ed. 1357] (1931), and *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503 [89 S.Ct. 733, 21 L.Ed.2d 731] (1969). *Tinker* held that, absent a showing of material and substantial interference with the requirements of school discipline, schools may not restrain the full First-Amendment rights of their students. *Near* established one of those rights, freedom to distribute a publication without prior censorship." [Footnote omitted.] *Fujishima,* 460 F.2d at 1357.

Fujishima recognized that a school district may lawfully establish a rule punishing students who publish and distribute on school grounds material which is obscene or libelous. *See also, Sullivan* v. *Houston Independent School District,* 333 F.Supp. 1149, 1162-1167 (S.D.Tex. 1971).

OBSCENITY

Perhaps the major thrust of the defendants' attack concerns "obscenity." Obscenity was defined in *Roth* v. *United*

States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1957), in the following terms:

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Mr. Justice Brennan, delivering the opinion of the Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts,* 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966), stated:

> "Under this definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Later, Mr. Justice Brennan discussed the power to employ variable concepts of obscenity in *Ginsberg* v. *New York,* 390 U.S. 629, 636, 88 S.Ct. 1274, 1278, 20 L.Ed.2d 195 (1968), and quoted the Court of Appeals of New York in *Bookcase, Inc.* v. *Broderick,* 18 N.Y.2d 71, 271 N.Y.S.2d 947, 952, 218 N.E.2d 668, 671 (1966):

> "[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined."

In determining whether future issues of the *Corn Cob Curtain* may be determined "obscene" pursuant to the three-pronged definition as applied to minors, two important limitations on the obscenity test must be remembered. First, the definition of "contemporary community standards" by which a work must be judged to determine its

obscenity must necessarily be the community standards of the Indianapolis School District, not merely one school in said district. Second, in judging whether a publication of the *Corn Cob Curtain* is "obscene" according to legal standards laid down by the higher courts, the whole publication must be considered. As long ago as 1934 it was held that a publication must be considered as a whole in order to determine whether it is obscene. *United States* v. *One Book Entitled "Ulysses" by James Joyce,* 72 F.2d 705, 707 (2d Cir. 1934). *See, Roth* v. *United States, supra.* A federal court recently rejected the argument that an alleged obscene newspaper need not be judged as a whole, because it is merely a package of separate publications. *United States* v. *Head,* 317 F.Supp. 1138, 1143 (E.D.La.1970).

BAN ON SALES

A further objection to the Board's regulations concerns the ban on sale of distributable literature. As presently constructed, Rule 11.05, Section 1.3.1.5, would prevent many worthwhile fund raising projects on school grounds, for example, magazine sales by school band members or the often financially necessary sale of the "local school newspaper." Likewise, Rule 11.06 would prohibit fund raising for charities and other public service groups organized outside the school. Further, defendants would prohibit all sales of distributable literature, irrespective of "disruption." "Such a blanket proscription is not a legitimate exercise of the Board's power to regulate the 'time, place and manner' of distribution." *Sullivan* v. *Houston Independent School District, supra,* 333 F.Supp. at 1162.

Accordingly the Court concludes, and it is hereby ordered, that the named plaintiffs who are no longer students in a secondary school of the City of Indianapolis have no standing to sue in this cause. *See, consolidated appeals, Passwater* v. *Myers, Steel* v. *Kuykendall, Monroe* v. *Eads,* Nos. 71-1367, 71-1570, 71-1571 (7th Cir., September 15, 1972); *Watkins* v. *Chicago Housing Authority,* 406 F.2d 1234 (7th Cir. 1969). However, the remaining named plaintiffs are qualified as proper representatives of the class whose interest they seek to protect. *Fujishima* v. *Bd. of Education, supra.*

It is further ordered that the defendants, their successors in office, their agents, servants, and employees, and all those in active concert and participation with them are hereby permanently restrained and enjoined from the promulgation, maintenance and enforcement of any such rule, or portion thereof, found in this entry to be unconstitutional unless the following conditions are met:

(1) The rule must be specific as to places and times where possession and distribution of published materials are prohibited.

(2) The rule must be understandable to persons of the age and experience of covered students.

(3) The rule must not prohibit or inhibit conduct which is orderly, peaceful and reasonably quiet and which is not coercive of any other person's right to accept or reject any written material being distributed subject to the rule.

(4) The rule may prohibit such distribution at times and in places where normal classroom activity is being conducted. Such rule may not prohibit such distribution at other times and places unless such prohibition is necessary to prevent substantial and material interference with or delay of normal classroom activity or normal school function. As used herein, "normal classroom activity" means organized educational activity of students under the direct supervision of a teacher or a school administrator. Such phrase includes student activity in library areas, physical education classes, whether conducted indoors or outdoors, official assemblies and other similar gatherings. "Normal school function" means such activities as athletic contests, band concerts, school plays and scheduled on-campus lunch periods. Further, the peaceful, orderly, non-coercive distribution of written material before the commencement of classes in the morning and after the conclusion of classes in the afternoon by students lawfully on or off the premises of the school in which they are enrolled shall not be prohibited unless, under the circumstances, such distribution substantially and materially interferes with some normal classroom ac-

tivity or normal school function as those phrases are hereinabove defined.

(5) The rule must not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material, provided, however, that defendants and their successors in office may prohibit, and punish, even to the extent of expulsion, for the publication or distribution of obscene material, hereinabove defined, or of libelous material for which a cause of action may exist in some person.

Sullivan v. *Houston Independent School District*, 333 F. Supp. 1149, 1152-1153 (S.D.Tex. 1971).

For the hereinabove reasons and pursuant to the plaintiffs' prayer for relief, it is the further judgment of this Court that the following defendants' rules, or portions thereof, are unconstitutional and should be, and they are, hereby declared to be null and void:

Rule 11.05, in part, as follows:

Proviso 1.1.1.3, as being vague and overbroad. [The Court would suggest that the following would be more apt to be constitutionally acceptable: ". . . either by its content or by the manner of distribution itself, productive of, or likely to produce a substantial and material interference with or delay of normal classroom activity or normal school function."]

Proviso 1.1.1.4, as requiring prior censorship. *See, New York Times* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

Proviso 1.3.1.1, as being overbroad and impermissible. *See, Fujishima* v. *Bd. of Education*, 460 F.2d 1355 (7th Cir. 1972); *Sullivan* v. *Houston Independent School District*, 333 F.Supp. 1149, 1152 (S.D.Tex. 1971).

Proviso 1.3.1.5, as being vague, overbroad and impermissible. *See, Sullivan* v. *Houston Independent School District, supra* at 1162.

Proviso 1.3.1.6, as requiring prior censorship and restraint. *See, Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Scoville* v. *Board of Ed. of Joliet Tp. H. S. Dist. 204, etc.*, Ill., 425 F.2d 10 (7th Cir. 1970).

Rule 11.06, in total, as being overbroad and impermissible.

See, Sullivan v. *Houston Independent School District, supra*, 333 F.Supp. at 1162.

Further, this Court takes no action on the plaintiffs' request to expunge from their personal files any notations relating to this matter since no evidence was submitted indicating such a recordation.

In addition, with respect to plaintiffs' request for compensatory damages, the Court finds that plaintiffs have not established sufficient data from which the Court can properly estimate the extent of the damages, if any. Such damages sought to be recovered must be shown with reasonable certainty as to their nature and extent, and may not be based on mere speculation or conjecture. *Bond* v. *Snyder Const. Co.*, 142 Ind.App. 325, 234 N.E.2d 659 (1968).

Finally, the costs of this action, excluding attorney fees, shall be taxed against the defendants.

APPENDIX C

In the

United States Court of Appeals

for the Seventh Circuit

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973
No. 72-2030

JEFF JACOBS, ET AL.,
Plaintiffs-Appellees,

v.

THE BOARD OF SCHOOL COMMISSIONERS, ETC., ET AL.,
Defendant-Appellants.

Appeal from the United States District Court for the Southern District of Indiana.

IP 72-C-236

WILLIAM E. STECKELR, *Judge.*

ARGUED SEPTEMBER 19, 1973— DECIDED DECEMBER 14, 1973

Before FAIRCHILD and CUMMINGS, *Circuit Judges,* and CHRISTENSEN, *Senior District Judge.**

FAIRCHILD, *Circuit Judge.* Defendants are officials of the Indianapolis school system. They appeal from a judgment enjoining the enforcement of certain rules governing the distribution by students of communicative written materials within the Indianapolis public school buildings and upon the grounds of such buildings. The named plaintiffs were or had been high school students when the action

* Senior District Judge A. Sherman Christensen, of the District of Utah, is sitting by designation.

was started. They challenged defendants' suppression of an unofficial student newspaper, entitled the Corn Cob Curtain, in the publication and distribution of which plaintiffs had participated. The relevant rules of the Board were amended while the action was pending. The decision and judgment appealed from are reported, *Jacobs* v. *Board of School Com'rs of City of Indianapolis,* 349 F.Supp. 605 (S.D.Ind., 1972).

1. *Refusal to appoint a guardian ad litem.*

Plaintiffs were minors, represented by counsel. They alleged that activities of defendants violated their first and fourteenth amendment rights. They sued on behalf of themselves and all other high school students under defendants' jurisdiction. They primarily sought injunctive relief except that they also prayed for $150 compensatory damages and nominal or other punitive damages. Except for the prayer for damages in modest amount, plaintiffs won.

The district court denied defendants' petition for appointment of a guardian ad litem. Under the present circumstances, it is doubtful that defendants have a sufficient interest to raise this point on appeal. There is little reason to suppose that defendants would be exposed to any risk as a result of a claim that plaintiffs or class members are not bound by the judgment because there was no personal representative, next friend, or guardian ad litem. In *Roberts* v. *Ohio Casualty Insurance Company,* 256 F.2d 35 (5th Cir., 1958), relied on by defendants, and where a judgment was reversed for failure to appoint, it was the unrepresented minor who sought reversal. Nevertheless, defendants argue that the judgment should be reversed on this ground.

Rule 17(c), F.R.Civ.P., provides in part: "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Defendants apparently concede that neither the appointment of a guardian ad litem nor a protective order in lieu thereof is mandatory, and neither is required if the court

considers the matter and makes a judicial determination that the infant is protected without a guardian. *Roberts, supra,* p. 39. See *Till* v. *Hartford Accident & Indemnity Co.,* 124 F.2d 405, 408 (10th Cir., 1941); *Westcott* v. *United States Fidelity & Guaranty Co.,* 158 F.2d 20, 22 (4th Cir., 1946).

Here the question was argued and considered. We do not agree with defendants that the court's emphasis, in its oral ruling, on the fact that constitutional issues were presented, and that substantial monetary recovery was not sought, demonstrates a failure to decide the appropriate question. Moreover, there is nothing in the record which indicates that the minors were represented inadequately or that any party was prejudiced by the absence of a guardian ad litem. See *Till* and *Westcott, supra,* and *Rutland* v. *Sikes,* 203 F.Supp. 276 (E.D.S.C., 1962), aff'd on other grounds, 311 F.2d 538, *cert. denied* 374 U.S. 830.

2. *The Constitutionality of the Board's Regulations.*

During the 1971-1972 public school term, five issues of the Corn Cob Curtain were published. They contained letters, articles about politics, education, student affairs, religion, and American history, music, movie, and book reviews, poetry, and cartoons. The first four issues were distributed in Indianapolis high schools. At the time the fifth issue was ready for distribution, school authorities notified the student population that school board rules prohibit sales or solicitations on school grounds without the express prior approval of the General Superintendent. After conferring with various school officials, the named plaintiffs were informed that the Corn Cob Curtain could no longer be distributed because it contained obscene materials. Appellees refrained from distributing the fifth issue pending resolution of these issues in the courts.

At the time of the above events, Sections 11.05 and 11.06 of the Board's rules prohibited the sale or distribution of literature in the public schools without express prior approval of the General Superintendent. After the district judge stated his belief that these rules were unconstitutional

prior restraints under *Fujishima* v. *Board of Education,* 460 F.2d 1355 (7th Cir., 1972), the defendants amended the rules to their present form. The district court held that the amended rules were unconstitutional.

The amended rules involved are set forth at 349 F.Supp. 607-9. Rule 11.05 consists of a series of numbered items or paragraphs, designated in the district court judgment as provisos. We adopt that term, and proceed to consider the arguments made by defendants with respect to them.

(a) *Amended Rule 11.05, Proviso 1.1.1.3*

Reading provisos 1.1.1. and 1.1.1.3 together, they provide:

> "No student shall distribute in any school any literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others."

The district court held that this rule was both vague and overbroad. We agree.

It is well established that a criminal statute is void for vagueness if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972); *United States* v. *Dellinger,* 472 F.2d 340, 355 (7th Cir., 1972), *cert. denied* 410 U.S. 970. Vague laws are constitutionally offensive for several reasons:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a

vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned, supra,* at 108-109, footnotes omitted.

Here, there is no criminal statute before us. Nonetheless, a student who violates amended Rule 11.05 is subject to suspension or expulsion or other disciplinary action. Proviso 1.61. We conclude that the penalties for violation are sufficiently grievous to mandate careful scrutiny for vagueness. *See generally Baggett* v. *Bullitt,* 377 U.S. 360, 374 (1964). We note the substantial danger of inadequate warnings to students, of arbitrary enforcement by teachers and principals, and of inhibition of full exercise of students' first amendment rights.

We think that proviso 1.1.1.3 is vague in defining the consequences which will make a distribution of literature unlawful. Those consequences are articulated as "a significant disruption of the normal educational processes, functions, or purposes in any of the Indianapolis schools, or injury to others." Is decorum in the lunchroom a "normal educational . . . purpose"? If an article sparks strident discussion there, is the latter a "disruption"? When does disruption become "significant"? The phrase "injury to others" is also vague. Does it mean only physical harm? Does it include hurt feelings and impairment of reputation by derogatory criticism, short of defamation, since libelous material is already covered by proviso 1.1.1.2?

Defendants argue unpersuasively that proviso 1.1.1.3 is not over-vague because of its similarity to the text of the standard by which the Supreme Court tested a precise regulation against wearing armbands in *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 514.[1] It does not at all

[1] In *Tinker,* the Supreme Court held that a state may restrain students from fully exercising their first amendment rights only if it is demonstrated that the school authorities reasonably forecast substantial disruption of or material interference with school activities or discipline. *Tinker, supra* at 514.

follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.[2]

Proviso 1.1.1.3 is also unconstitutionally overbroad. In *United States* v. *Dellinger, supra,* 357, this court stated: "The doctrine of overbreadth applies when a statute lends itself to a substantial number of impermissible applications, such that it is capable of deterring protected conduct, when the area affected by the challenged law substantially involves first amendment interests, and when there is not a valid construction which avoids abridgement of first amendment interests" (footnotes omitted). These factors are present here.

The overbreadth stems both from the vagueness described above and from the inclusiveness of the phrase "productive of, or likely to produce" in the proviso. Expression may lead to disorder under many circumstances where the expression is not thereby deprived of first amendment protection. See *Braxton* v. *Municipal Court,* Supreme Court of California, 42 L.W. 2243, (October 4, 1973). We do not read *Tinker* as authorizing suppression of speech in a school building in every such circumstance where the speech does not have a sufficiently close relationship with action to be treated as action. See *Dellinger, supra,* 360.

Where the boundaries between prohibited and permissible conduct are ambiguous, we can not presume that the curtailment of free expression is minimized. *NAACP* v. *Button,* 371 U.S. 415, 432 (1963); *United States* v. *Dellinger, supra,* 356-57. Instead the plaintiffs are permitted to attack the regulation by suggesting impermissible applications without demonstrating that their own conduct "could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965). See *Gooding* v. *Wilson,* 405 U.S. 518, 521 (1972). Proviso 1.1.1.3 at least threatens a penalty for a student

[2] *e.g., Miller* v. *California,* 41 L.W. 4925, 4928 (June 21, 1973).

who distributed a controversial pamphlet in a lunchroom resulting in robust arguments or who distributed a newspaper including derogatory but not defamatory remarks about a teacher. Absent extraordinary circumstances, the school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents. See *Tinker, supra.* Finally, we note that this court lacks jurisdiction to place an authoritative limiting construction upon this state regulation in contrast with the power of federal courts with respect to interpretation of federal statutes or regulations. *United States* v. *37 Photographs,* 402 U.S. 363, 369 (1971), *cert. denied* 403 U.S. 924.

(b) *Amended Rule 11.05, Proviso 1.1.1.4.*

Reading provisos 1.1.1. and 1.1.1.4 together, they provide:

> "No student shall distribute in any school any literature that is . . . not written by a student, teacher, or other school employee; provided, however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

We have no doubt that this rule abridges first amendment rights of plaintiffs, although not for the reason assigned by the district court. Whether the student distribution of literature be viewed as individual speech or as press publication, we think that authorship by a non-school person of the material distributed is not germane to any of the constitutional standards which must be met before conduct which is also expression can be prohibited.

Defendants suggest that student distribution of materials written by non-students and outside organizations tends to produce disorder and interference with school functions, and cite the example that "stores would undoubtedly pay students to distribute flyers advertising their products." Assuming, however, some area of possible validity, the rule is overbroad. It would prohibit use of materials written by individuals from all sorts of walks

of life whose views might be thought by the students to be worthy of circulation. "Predictions about imminent disruption . . . involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 100 (1972).

(c) *Amended Rule 11.05, Proviso 1.3.1.6.*

Literature not proscribed under 1.1.1, 1.1.1.1 to 1.1.1.4, is referred to as "distributable literature." (Proviso 1.1.2). Reading proviso 1.3.1 and 1.3.1.6 together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself."

In *Talley* v. *California,* 362 U.S. 60 (1960), the Supreme Court held invalid a city ordinance prohibiting the distribution of handbills in any place unless the handbills disclosed the names and addresses of the persons who printed, wrote, manufactured and distributed the handbills. Noting the historical importance of anonymous publications as a vehicle for criticizing oppressive practices and laws, the Court held that the broad prohibition of the ordinance violated the first amendment. *Talley, supra,* 63-65.[3]

Anonymous student publications perform similarly within the school community; without anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. Although the rule leaves students free to distribute anonymous literature beyond the school house gate, the question here, as in *Tinker,* is whether the state has demonstrated a sufficient justification for this prohibition within the school community, where students and teachers spend a significant portion of their time. See *Tinker, supra,* 506. Defendants

[3] We note that in the recent case of *Branzburg* v. *Hayes,* 408 U.S. 665, 680 ff. (1972), the Supreme Court carefully distinguished the question of whether a newspaper reporter must respond to a grand jury subpoena from the question of whether the press could be required to publish or indiscriminately disclose all its sources.

contend that the names of persons who have "participated in the publication" of literature must be provided so that those responsible for the publication of libelous or obscene articles can be held accountable. However, here as in *Talley*, the requirement is not limited to material as to which such justification might be urged. Indeed, if the regulation be read literally, 1.3.1.6 applies only to literature the content of which is acceptable. School authorities could not reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school activities or discipline. See *Tinker, supra*, 514.

(d) *Amended Rule 11.05, Proviso 1.3.1.5 and Rule 11.06.*

Reading 1.3.1 and 1.3.1.5 together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . in immediate exchange for money or any other thing of value . . . , whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature. . . ."

Amended Rule 11.06 provides that:

> "No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus."

Plaintiffs suggest that these rules were adopted to accomplish indirectly that which can not be accomplished

directly: the blanket prohibition of the distribution of the Corn Cob Curtain and other similar student newspapers. Plaintiffs alleged the dependence of the paper upon contributions of money for survival. It can readily be observed that a ban upon the receipt of contributions on school grounds would create financial difficulties in raising the $120 to $150 necessary to publish each edition of the Corn Cob Curtain. In *Grosjean* v. *American Press Company*, 297 U.S. 233 (1935), the Supreme Court considered the constitutionality of a Louisiana tax upon the advertising revenue of newspapers with a circulation of more than 20,000 copies per week. After finding that the effect of the tax might be to destroy both the advertising and circulation of the newspapers and noting with suspicion the form of the tax, the Court concluded that the tax was a "deliberate and calculated device . . . to limit the circulation of information to which the public is entitled," in violation of the first amendment. *Grosjean, supra*, 244, 250.

Assuming, however, that the rules are not a "deliberate and calculated device" to suppress the student newspaper, it becomes necessary to analyze the justification offered by defendants. They assert the legitimacy of an interest in preventing the use of school premises "for non-school purposes—particularly commercial activities." Rule 11.06 is a general prohibition against sales of materials and solicitation of funds except for the benefit of the school. If there were any question of its intended applicability to sales by students of their unofficial newspaper, proviso 1.3.1.5 makes specific application.

We have little question of the legitimacy of the interest of the school authorities in limiting or prohibiting commercial activity on school premises by persons not connected with the school, either acting directly or through students as agents. But because students have first amendment rights within the school, as recognized in *Tinker*, we think that the propriety of regulation of their conduct involving the exercise of protected rights must be independently justified. It is not enough to say that such activity by students is similar to commercial activity by others.

Sale of the newspaper, or other communicative material

within a school, is conduct mixing both speech and non-speech elements. In order to determine whether a "sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms," we must consider whether the regulation "is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), *reh. denied* 393 U.S. 900.

Ultimately, defendants rely on the proposition that "Commercial activities are time-consuming unnecessary distractions and are inherently disruptive of the function, order and decorum of the school."

Provisos 1.3.1.2, .3 and .4 already regulate the place and manner of distribution so as to avoid interference with others and littering. They have not been challenged here. It has not been established, in our opinion, that regulation of the place, time, and manner of distribution can not adequately serve the interests of maintaining good order and an educational atmosphere without forbidding sale and to that extent restricting the first amendment rights of plaintiffs.

(e) *Amended Rule 11.05, proviso 1.3.1.1.*

Reading provisos 1.3.1 and 1.3.1.1. together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . while classes are being conducted in the school in which the distribution is to be made."

It is well established that the right to use public places for expressive activity is not absolute and that "reasonable 'time, place and manner' regulations [which] may be necessary to further significant governmental interests" are constitutionally permissible. *Grayned* v. *City of Rockford,* 408 U.S. 104, 115 (1972), and cases cited therein. The question here is whether the Board could reasonably

forecast that the distribution of student newspapers anywhere within a school at any time while any class was being conducted would materially disrupt or interfere with school activities and discipline. See *Grayned* v. *City of Rockford, supra* at 118. In determining whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, . . . we must weigh heavily the fact that communication is involved [and] the regulation must be narrowly tailored to further the State's legitimate interest." *Grayned* v. *City of Rockford, supra* at 116-117.

We are hampered in evaluating proviso 1.3.1.1 by the paucity of evidence in the record with respect to arrangements and schedules of classes in the Indianapolis secondary schools. Nonetheless, it does appear that there are periods in the morning, around noon, and in the late afternoon when, although some classes are in session, substantial numbers of students are on the premises, are not involved in classroom activity, and are barred by proviso 1.3.1.1 from distributing and indirectly from receiving student newspapers. We conclude that the defendants have not satisfied their burden of demonstrating that the regulation banning distribution at all these times is narrowly drawn to further the state's legitimate interest in preventing material disruptions of classwork. See *Tinker, supra* at 513.

3. *Defendants' claim concerning obscenity and profanity.*

Defendants' original answer averred, among other things, that plaintiffs' publications are obscene, indecent, vulgar, and profane. While the action was pending, the rules were amended so that when Rule 11.05, provisos 1.1.1 and 1.1.1.1, are read together, they provide: "No student shall distribute in any school any literature that is . . . obscene as to minors. . . ."

The district court did not directly decide defendants' claim that the existing issues of Corn Cob Curtain were obscene. Presumably the court deemed the proviso valid, for the decision indicates that the appropriate inquiry

concerning obscenity would be whether future issues of the paper would be obscene as to minors. The decision, 349 F.Supp. at 610, set forth the then controlling *Roth-Memoirs* definition of obscenity, the concept of variable obscenity permitting a less exacting standard where material is directed at children, and other limitations to be regarded in making the determination.

Necessarily we observe that proviso 1.1.1.1 lacks the specific definition of sexual conduct the description of which is prohibited as now required for a valid law under *Miller* v. *California*, ... U.S. ....., 41 L.W. 4925, 4928 (June 21, 1973).

In any event, a substantial portion of defendants' brief is devoted to what it terms the most crucial issue, "whether school authorities may constitutionally and legitimately prevent and/or punish the use of defamatory, obscene and indecent language in the school house which is contrary to the moral standards of the community."

In the first place, the issues of the Corn Cob Curtain in the record are very far from obscene in the legal sense. A few earthy words relating to bodily functions and sexual intercourse are used in the copies of the newspaper in the record. Usually they appear as expletives or at some similar level. One cartoon depicts a sequence of incidents in a bathroom. This material amounts only to a very small part of the newspapers, which are tabloid size, containing eight or twelve pages. These issues contain no material which is in any significant way erotic, sexually explicit, or which could plausibly be said to appeal to the prurient interest of adult or minor. See *Cohen* v. *California*, 403 U.S. 12, 20 (1971).

In *Miller, supra*, the Supreme Court limited the scope of the obscenity exception to first amendment protection to "works which depict or describe sexual conduct" and "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Clearly the newspaper issues in the record do not even approach fulfillment of this definition.

Nor need we speculate about the exact effect of *Miller* on the variable obscenity concept exemplified by *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Making the widest conceivable allowances for differences between adults and high school students with respect to perception, maturity, or sensitivity, the material pointed to by defendants could not be said to fulfill the *Miller* definition of obscenity.

It is well established that a distinction must be drawn between obscene materials and non-obscene materials containing profanity. *Cohen* v. *California*, 403 U.S. 15, 20 (1971); *Fujishima* v. *Board of Education*, 460 F.2d 1355, 1359 n. 7 (7th Cir., 1972). The only possible question is whether the Board's educational responsibilities justify its preventing the use by students in these circumstances of words considered coarse or indecent. Clearly a university can not constitutionally regulate expression on that ground. *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973). Although there is a difference in maturity and sophistication between students at a university and at a high school, we conclude that the occasional presence of earthy words in the Corn Cob Curtain can not be found to be likely to cause substantial disruption of school activity or materially to impair the accomplishment of educational objectives. *Scoville* v. *Board of Ed. of Joliet T.P.H.S. Dist. 204, Etc. Ill.*, 425 F.2d 10, 13 (7th Cir., 1970).

The injunction is broad enough to cover enforcement of the particular rules at all schools under the jurisdiction of defendants. At oral argument, plaintiffs conceded that their case was limited to the application of the rules in high schools. We therefore had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools. Should defendants apply to the district court to limit the injunction to high schools, nothing in this decision forecloses the consideration of the application on its merits.

The judgment appealed from is affirmed.

CHRISTENSEN, *Senior District Judge*, concurring in part and dissenting in part:

I am in general agreement with the majority opinion as it relates to the guardian ad litem problem and the invalidity of Provisos 1.1.1.4, 1.3.1.6, 1.3.1.5 and 1.3.1.1 of Rule 11.05, and Rule 11.06 of the appellant board.

I dissent, however, from those parts of the opinion holding that Rule 11.05, Proviso 1.1.1.3, is invalid for vagueness and overbreath* and that certain language used in the Corn Cob Curtain was not "obscene as to minors" in the high school context and thus in contravention of Amended Rule 11.05, Proviso 1.1.1.1.

And I find myself in disagreement with the conclusion "that the occasional presence of earthy words in the Corn Cob Curtain cannot be found to be likely to cause substantial disruption of school activity or materially to impair the accomplishment of educational objectives". The euphemisms employed to describe contents of the publication do not fully indicate the type of language and imagery that are given rein; whether constituting the predominant part, or merely an inescapably dominating part of any particular issue, it seems clear that expressions are used which in a high school, not to mention an elementary school would materially impair the accomplishment of educational objectives.

More likely obscene in these contexts are certain Corn Cob expressions than those involved in *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973), would be in the setting of a university. Hence, it may not be presumptuous to suppose that when a situation is evaluated corresponding to the one we have before us the majority of that court may be inclined to accept an extrapolation of the views expressed in the dissent of the Chief Justice to the effect that preclusion of the regulation of such material by school authorities would not protect values inherent in the First Amendment but would demean them (410 U.S. at p. 672), and those of Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Blackmun joined, that "insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university [high school or elementary school] which it operates serves neither the Constitution nor public education well." (410 U.S. at p. 677.)

* No determinative difference is perceived between this rule and its rewording which the trial court thought "more apt to be constitutionally acceptable". 349 F. Supp. at pp. 611-612.

That at oral argument "plaintiffs conceded that their case was limited to the application of the rules in high schools" does not seem to me a sufficient reason for our failure to hold as to elementary schools of all places that the trial court's decision involved error. Appellees should not be permitted to waive the contentions of appellants, who have argued here both overbreadth and invalidity of the injunction. To the extent hereinabove indicated, I am of the opinion that appellants are right on both scores. And to that limited extent it appears to me that until now this court, as well as the Supreme Court, has not committed itself to an irreconcilable view.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 17 (c) of the Federal Rules of Civil Procedure provides:

"Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other orders as it deems proper for the protection of the infant or incompetent person."

APPENDIX E

Applicable sections of present Board rules provide:

RULE 11.05

"Section 1.6.1—For violation of any of the provisions of this Rule 11.05 a student may be suspended or expelled by the principal of the school where such violation occurs and the principal or any teacher of the school may take other disciplinary action which is reasonably desirable or necessary to help any student, to further school purposes, or to prevent any interference therewith.

"Section 1.6.2—In the event that suspension or expulsion is deemed necessary, the due process provision of Public Law 162 of the laws of the State of Indiana and the rules of this Board adopted by Resolution 1030 shall apply."

The sections of Rule 11.05 and Rule 11.06, promulgated by the Indianapolis School Board, which were held *unconstitutional* provide:

RULE 11.05

"No student shall distribute in any school any literature that is—

"Section 1.1.1.3—Either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.

"Section 1.1.1.4—Not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted.

"No distributable literature shall be distributed by any student in any school—

"Section 1.3.1.1—While classes are being conducted in the school in which the distribution is to be made;

"Section 1.3.1.5—In immediate exchange for money or any other thing of value (or for an immediate promise of money or any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature; or

"Section 1.3.1.6—Unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

RULE 11.06

"No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus."

APPENDIX F

RESOLUTION NO. 1033, September, 1972

RESOLUTION RESCINDING SECTION 11.05 OF *POLICY & REGULATIONS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS* AND ADOPTING A NEW POLICY PERTAINING TO DISTRIBUTION AND DISPLAY OF WRITTEN AND PICTORIAL MATERIAL BY STUDENTS

WHEREAS, legal counsel has reported that Section 11.05 of the Rules of the Board has been declared unconstitutional by the Federal District Court for the Southern District of Indiana, and that a modification of said rule by providing procedural safeguards for students is advisable to avoid further litigation; and

WHEREAS, said legal counsel have prepared a proposed revision providing said safeguards;

IT IS, THEREFORE, RESOLVED that Section 11.05 be rescinded and the new rule shall read as follows:

> The Board of Education desires to encourage individual freedom from expression and creativity by students with the Indianapolis Public School System and will approve the general distribution and/or display of any written and pictorial matter which upon review will not materially or substantially (1) interfere with the proper and orderly operation of the school (2) disrupt class or school activities, or (3) infringe upon the rights of others.
>
> Prior to general distribution or display, all such material shall first be submitted to the principal or to such Review Board as may be designated within each individual school by the principal.
>
> The principal or Review Board shall review the material to determine whether or not approval for distribution or display shall be given and shall inform the student or students of a decision by 9:00 a.m. of the

second regularly scheduled school day following the date of submission of the material or such sooner time as may be reasonably practicable. If the student or students do not receive notice of a decision within the time aforesaid, it shall be presumed that the material is approved for distribution.

In the event that the material is approved for general distribution or display or no notice is given within the time set forth above, the student or students may distribute or display such material at the time and place customarily designated for such purpose within each school or, if such place is inappropriate, shall be advised of the manner, time, and place for distribution or display and shall be given a reasonable opportunity to generally distribute such material consonant with the physical facilities, operation, and educational routine of the school.

In the event that the material is not approved, the student submitting the material shall be notified in writing of the rejection and the reason for the rejection shall be included. Said student shall thereafter be entitled to a hearing by filing a charge with the Superintendent in the manner provided by Public Law 162 to the extent applicable.

In granting or denying approval, the following guidelines or rules shall apply:

1. No material shall be distributed which, either by its content or by the manner of distribution itself will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.
2. No obscene material shall be distributed.
3. No libelous material shall be distributed.
4. No material shall be distributed unless the editor or some person in charge of the material verifies the identity of the author(s) of the material.
5. No material shall be distributed which contains indecent, vulgar or profane language, cartoons or pictures.

6. No material shall be distributed which advocates lawlessness or a disregard of school rules.
7. No material shall be distributed which subjects school administrators and personnel to ridicule. Responsible criticism shall be allowed.

Where the principal or Review Board deem it desirable, each school may enact supplemental regulations relating to the general distribution or display of student material within the scope and spirit of this policy.

The purpose of this policy is to encourage responsible student activity and to this end the policy is to be applied reasonably and responsibly taking into consideration the rights of the students, faculty, and school administration in conjunction with the physical facilities and orderly operations of the school.

For violation of this rule, a student may be suspended or expelled from school or the administrators or teachers of the school corporation may take any other action reasonably desirable or necessary to help any student, to further school purposes, or to prevent an interference therewith.